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No. 80-2102

In the Supreme Court of the United States

OCTOBER TERM, 1981

SHEILA RENDELL-BAKER,
PETITIONER,
v.
SANDRA KOHN, ET AL.,
RESPONDENTS,

WAYNE KLUG, ET AL.,
PETITIONERS,
v.
NEW PERSPECTIVES SCHOOL, INC., ET AL.,
RESPONDENTS.

On Writ of Certiorari to
The United States Court of Appeals
For The First Circuit

BRIEF FOR RESPONDENTS

MATTHEW H. FEINBERG*
85 Devonshire Street
Boston, MA 02109
Attorney for Respondents

* Counsel of Record

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I

QUESTION PRESENTED

Does the Public Function Doctrine of State Action Transform a Private School Into a State Actor Because It Provides Educational Services to Special Needs Children at Public Expense?

II

PARTIES BELOW

The Court of Appeals for the First Circuit consolidated these two appeals from the District Court for the District of Massachusetts. In No. 80-1328 below, the plaintiff-appellant was Sheila Rendell-Baker; the defendants-appellees were New Perspectives School, Inc., Sandra Kohn (individually and as director of the school), the members of the Board of Directors of the school (individually and in their official capacities),[1] Francis X. Bellotti (as Chairman of the Massachusetts Committee on Criminal Justice), and William Highgas[2] (as Executive Director of the Massachusetts Committee on Criminal Justice). In No. 80-1451 below, the plaintiffs-appellees were Wayne Klug, Carolyn Anderson, Paul Stein, William Tilden, and Dawn Fonseca; the defendants-appellants were New Perspectives School, Inc., Sandra Kohn (individually and as director of the school), and the members of the Board of Directors of the school (individually and in their official capacities).[3]

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[1] The individual members of the school's Board of Directors named in the *Rendell-Baker* complaint were Susan Alford, John Businger, Jackie W. Cooper, Stephen B. Goldenberg, Rodney Jackson, Joanne Neiman, James Schlesinger, Rina Wald Spence, Tonia Yee and Edward Zarsky.

[2] William Highgas was substituted as a named party after he succeeded Robert J. Kane, who was originally named in the complaint, as Executive Director of the Massachusetts Committee on Criminal Justice. Respondents Bellotti and Highgas are separately represented in these proceedings by the Attorney General of Massachusetts and have filed a separate brief.

[3] The individual members of the school's Board of Directors named in the *Klug* complaint were James W. Schlesinger, Stephen B. Goldenberg, Joseph Gartner, Joanne Neiman, David Bachrach, Rodney Jackson, Rina Wald Spence, Susan Alford, Rhoda Goodwin, Rina Hamberg, Tonia Yee, and Edward Zarsky.

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Opinions and Judgments Below

The opinion of the court of appeals for both cases as consolidated on appeal is reported at 641 F.2d 14 (1st Cir. 1981) and appears in the Petition for Certiorari Appendix at 1-26.

The Memorandum and Order for the District of Massachusetts in *Rendell-Baker* v. *Kohn, et al.*, No. 80-1328 below, is reported at 488 F. Supp. 764 (D. Mass. 1980) and also appears in the Petition for Certiorari Appendix at 27-39. The April 7, 1980 Memorandum and Order of the District Court for the District of Massachusetts in *Klug, et al.* v. *New Perspectives School, Inc., et al.*, No. 80-1451 below, is not reported and appears in the Petition for Certiorari Appendix at 40-57.

The judgment below in *Rendell-Baker* appears in the Petition for Certiorari Appendix at 58-59. The judgment below in *Klug* appears in the Petition for Certiorari Appendix at 60-61.

Jurisdiction

The judgment of the Court of Appeals for the First Circuit was entered in both appeals below on February 12, 1981. On May 4, 1981, this Court granted the petitioners' motion for an extension of time until June 12, 1981, within which to petition for certiorari. See 28 U.S.C. § 2101(c) (1976). The petition for certiorari was filed on June 12, 1981, and it was granted by an order dated October 13, 1981. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1) (1976).

Constitutional, Statutory, and Regulatory Provisions

The following constitutional, statutory, and regulatory provisions are set out hereto in Appendix A:

> United States Constitution, Amendment XIV, Section I; Massachusetts General Laws, Chapter 71B, Sections 1-5, 10; 603 Code of Massachusetts Regulations, Section 28, Paragraphs 205.1, 322.2, 504.4(a) (1979).

Statement of the Case

This case involves review of the single issue of whether the New Perspectives School, Inc. "may be fairly treated as . . . The State itself."[4] when it discharged petitioners who were staff members at the school. The issue hinges on the extent to which by its nature and function, the school can be said to be acting as the state itself rather than as a private entity, when it dismisses its personnel.

a. *The New Perspectives School*

The New Perspectives School is a small, non-profit school which offers a high school program to students who have had difficulty completing an ordinary high school. The school is organized as a non-profit corporation under the laws of Massachusetts and is located on privately owned property in the Town of Brookline, Massachusetts. The school is operated by a Board of Directors, no member of which is a government official or is chosen by any government official or governmental body. The school was initially set up with private funds but has become increasingly dependent upon public funds as they have become available.[5] This funding has been received from a variety of sources,[6] though the primary source for educational services comes from school committees' payments for services to students placed at the school under the so-called Chapter 766 statutory scheme (M.G.L. c. 71B, § 1 et seq.). Additional funds are received from private contributors and foundations but funds from the various governmental sources constitute 90% or more or the school's budget.[7]

The school services about 50 students all on a tuition-free basis. Virtually all the students have drug, alcohol or behavioral problems, or have other special needs, and have been referred to the

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[4] *Jackson* v. *Metropolitan Edison Co.*, 419 U.S. 345, 351 (1974).

[5] *Rendell-Baker* v. *Kohn*, 641 F.2d. 14, 16-17, fn.1.

[6] Sources other than the Town of Brookline have been the Massachusetts Department of Mental Health, Department of Youth Services, Massachusetts Division of Family and Children's Services; Office for Children and Law Enforcement Assistance Administration (LEAA).

[7] See respondent Kohn's answers to interrogatories, Joint Appendix, 86 (hereafter abbreviated as J.A.).

school by the Town of Brookline or the City of Boston under Chapter 766 or by the Drug Rehabilitation Division of the Massachusetts Department of Mental Health. However, students could also come to the school through private referral sources or on their own, or their family's, initiative.

b. *The Statutory Scheme*

The school's role as a provider of special needs education may better be seen in the context of the statutory scheme through which it becomes eligible for public funding. Chapter 766 was passed to create "a comprehensive and complete program of evaluation and placement for children with special education needs."[8] The school committee must provide an appropriate, publicly supported education to each school-age child with special needs. M.G.L. c. 71B, § 2, 3-4; see Code Mass. Regs. § 28 et. seq. (1979),[9] regulations promulgated pursuant to the statute. After the school committee diagnoses and evaluates the needs of each child with special needs, an individualized education program is proposed. The program may range from extra help in a regular classroom to full-time placement in a day or residential school, M.G.L. c. 71B, § 2; 603 CMR, ¶322.2 (1979). The statute seeks to "mainstream" children as much as possible. However, where no appropriate program is available, the school committee, with the approval of both the child's parents and the Department of Education, is authorized to enter purchase of service contracts with private schools, agencies or institutions to provide the necessary special education. M.G.L. c. 71B, § 4, 10. *Commonwealth* v. *School Committee of Springfield*, Mass. Adv. Sh. [1981] 502, 417 N.E.2d 408, 410 (1981). Although the private school is required to comply with the individual educational plan recommended for the child as well as with Chapter 766 regulations,[10] nothing in the statute or regulations imposes control over the private school's educational pro-

[8] *Commonwealth* v. *School Committee of Springfield*, Mass. Adv. Sh. [1981] 502, 417 N.E.2d 408, 410 (1981), citing *Board of Education* v. *Assessor of Worcester*, 368 Mass. 511, 515, 333 N.E.2d 450 (1975).

[9] Hereafter, references to these regulations will be cited as "CMR."

[10] 603 CMR 804.1-804.6.

gam, policies or philosophy.[11] New Perspectives School, like all eligible private schools, is free to pursue its own particularized approach to educating these "problem" students. The school committee's role in the actual educational process ends with the child's placement at the private school. Even then, it is New Perspectives School which retains final authority regarding admission of a referred student.[12] Once a student is admitted by the school, the school committee has no intervention authority regarding the educational plan or program. If the school committee is displeased with implementation of the child's educational plan, its only recourse is to seek to remove the child from the school.[13] Similarly, the statute and regulations consistently shy away from intervention in the private school's administrative policies or actions, including personnel matters such as hiring and firing of staff members or teachers. Even the Massachusetts Department of Education's guidelines require only that the school have available in writing its current personnel policies and practices and speak not at all to the substance of that policy.[14] Such a written policy was adopted and in effect at new Perspectives School, including a comprehensive grievance procedure to review the actions of the Director, in, among other matters, discharging staff members.

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[11] 603 CMR 803.1.

[12] 603 CMR 504.4(a).

[13] The regulations permit monitoring and evaluation and require regulatory compliance but vest no actual power or authority in the school committee to interfere with the program itself.

[14] *"Guidelines for the Approval of the Day Educational Component in Private Schools under Chapter 766"*, paragraph 201.01 (603 CMR). For a summary, see *Rendell-Baker, supra*, at 18. The guidelines are promulgated for conformity since the School must be approved by the Massachusetts Department of Education to receive placements and funding under Chapter 766. The school is also bound by its agreement with the Massachusetts Department of Mental Health, Drug Rehabilitation Division, but this contract makes no mention of personnel policies or rights of staff members. *Rendell-Baker, Id.* at 18. When the school accepts a child through the Boston School Committee, it is subject to a contract with the City of Boston. Other than subjection to the state conflict of interest law (M.G.L. c. 268A), the school "shall have no capacity to incur any liability on the part of the city. The Facility, its agents or employees shall not have the status or pension rights of a city employee . . .". Also, the school, not the city, assumes liability for claims "arising from any act or omission of the Facility, its agents or employees . . ." See *Rendell-Baker, Id.* at 18.

c. *The Discharge of Ms. Rendell-Baker*

Sheila Rendell-Baker was employed as a vocational counselor through funds provided by the LEAA under a grant which was channeled to the school through the Massachusetts Committee on Criminal Justice (MCCJ).[15] According to her complaint, in December, 1976, a controversy arose between a group of students and the school's director Ms. Sandra H. Kohn, related to the responsibilities of a student-staff council in the hiring of staff. The students presented a petition at a meeting of the Board of Directors. Ms. Rendell-Baker voiced support for their position, and Ms. Kohn voiced opposition. On January 3, 1977, without prior notice, Ms. Kohn requested that Ms. Rendell-Baker resign. When Ms. Rendell-Baker refused to resign, Ms. Kohn advised the MCCJ of her intention to discharge Ms. Rendell-Baker and thereafter dismissed her.[16] After her discharge and an exchange of letters, the school agreed to apply retroactively a newly adopted personnel policy, which provided for involuntary termination for specified causes, subject to review by a three-member grievance committee. The school's president appointed a grievance committee, but Ms. Rendell-Baker objected to its composition and demanded a formal hearing before a mutually agreeable committee. The school took no further action. After the dismissal, the school provided a

[15] The Committee's prior approval of hiring consisted of reviewing resumes submitted by the school to ensure that applicants' qualifications met the requirements established by the school in its proposal, and that the Committee did not interview applicants or exercise any subjective judgment in the hiring process. LEAA Circular A-87, provides in part:

> "Each grantee or contractor organization, in recognition of its own unique combination of staff facilities and experience, will have the primary responsibility for employing whatever form or organization and management techniques may be necessary to assure proper and efficient administration."

See Supplemental Affidavit of William Highgas, Jr., J.A. 105; "Principles for Determining Costs Applicable to Grants and Contracts with State and Local Governments", ¶2.c., J.A. 107.

[16] See the *Rendell-Baker* Record 63, 98.

satisfactory explanation to the MCCJ for the dismissal.[17] Ms. Rendell-Baker filed suit on July 28, 1977.

d. *The Discharge of Petitioners in* Klug.

The discharge of petitioners in *Klug* took place after a series of disturbances that persisted at the school following the Rendell-Baker dismissal. According to the complaint, the discharges occurred after "considerable discord among the administration, faculty and students at the School." J.A., ¶20. Given the instability of a student body with serious learning and behavioral problems, petitioners themselves agreed that the school's ability to provide services had been harmed if not destroyed by the failure of staff cohesiveness:

> "The School's ability to provide services has been seriously hindered and, in some cases, halted altogether. All the staff agree that the students are not being served.
>
> The staff also agrees that its own fragmentation has been a source of these problems."[18]

In response to this fragmentation, manifested by the plaintiffs' complaints and actions as outlined in their complaint, the School's Director held numerous meetings with faculty and students to discuss the reasons for the unrest and to seek suggestions for calming the School. But petitioners' grievances focused exclusively on the personal and professional integrity of the Director, with her inadequacies as the purported cause of the staff fragmentation. Their complaints were not at all related to constraints placed on petitioners' or other staff members' methods, means or manner of teaching *per se*. Disgruntled because the Director did not embrace their suggestions for change, particularly their call for her resignation, petitioners carried their grievances beyond the staff level, to the school's Board of Directors, the student body and the town newspaper. They prepared an affidavit of their complaints which

[17] The MCCJ premised approval for hiring a replacement on a satisfactory explanation for the dismissal. *Rendell-Baker* Record, 104, 115.

[18] Exhibit A, *Klug* Complaint, J.A. 30-31. See also Exhibit D, J.A. 64-66.

was made public and available to students. The affidavit, purportedly supported by detailed anecdotal material related to the school's operation, constituted a massive personal attack on the Director's personality, managerial skills and integrity.[19] The categories of the affidavit alone are demonstrative: "the director's inability to administer the program," "the director's undermining of staff effectiveness," "the director's inappropriate behavior toward, and inconsistent discipline of, students", "the director's insensitivity to issues of race", "the director's inappropriate, disrespectful, and unprofessional conduct" and "the director's precipitation of a school-wide crisis."

In response to their public demand for the Director's resignation, the Board of Directors gave the Director a vote of confidence. Public discussion, student picketing and disruption of the school program continued. At the close of the school year, petitioners were discharged for insubordination and disruption of the school program.[20]

After efforts to implement the school's grievance procedure failed due to petitioners' objections to the grievance panels' membership, petitioners brought suit in December, 1978.

Summary of Argument

The only issue before the Court is whether the respondent School may "be fairly treated ... as the State itself" when it discharged petitioner-employees. *Jackson* v. *Metropolitan Edison Co.*, *supra* at 351. Since the Fourteenth Amendment applies only "against state laws and acts done under State authority" (*The Civil Rights Cases*, 109 U.S. 3, 13 (1883)), it is this state action requirement that triggers the Amendment's restraints upon state power. Conversely, its absence stands as a protection from federal encroachment of individual and institutional autonomy. Unless respondents actions are held to be the actions of the state, their right to privacy, free association and institutional independence must remain free from the Amendment's reach.

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[19] The affidavit is attached to the *Klug* complaint as Exhibit B (J.A. 32-62).

[20] J.A. 26 (Complaint, ¶35).

Petitioners rest their Fourteenth Amendment claim on a kind of public function theory. The decision of the First Circuit is not challenged on any other grounds. Thus, petitioners concede that the state action requirement fails under the "nexus" test of *Jackson* or the "intertwinement" analysis of *Burton*.

The public function doctrine has been carefully confined to a narrow range of circumstances not present here. In order to attribute the acts of a private, independent school like respondents to the state under this doctrine, the state must have delegated to the school a function "traditionally exclusively reserved to the State." *Flagg Bros., Inc.* v. *Brooks*, 436 U.S. 149, 158 (1978); *Jackson*, *supra* at 351. In the first place, however, there has been no delegation by the state of such a function. To the limited extent of its application, the doctrine contemplates circumstances where the state has abdicated responsibility for a function or service it has always performed. Here, the reverse occurred. Passage of Chapter 766 constituted both an enhancement of public educational services and an outreach to private institutions through purchase of services contracts to assist those for whom public educational services might be inadequate or inappropriate. Moreover, regardless of how respondents came to provide it, special education is not now or ever has been a function exclusively reserved to the state. The provision of special education has been confined, until quite recently, to the private sector. The State's enhancement of its role did not render it the exclusive provider. The facts just do not bear this out. Moreover, beneficiaries have both private and public alternatives. Many special needs students and their families choose not to take advantage of the program, opting instead for a private setting of their own without any state involvement. For those who do take advantage of the program, there are built-in legal remedies to provide mechanisms for parents and their children to resolve disputes over an appropriate placement to fill their needs. In addition, alternatives are always available in the sense that these students may either remain in the public system or opt out of the public funding program altogether and seek a privately funded alternative.

Here, petitioners are not even beneficiaries of the function provided. Since the function does not serve them, their status precludes them from claiming that the school acted as to them. But even were the "function" defined this broadly, no conceivable "exclusivity" argument could be made as to petitioners since neither the state nor respondent monopolizes the special education employment market. On the contrary, for reasons perhaps having to do with the very flexibility and freedom from bureaucratic restraint that a private school affords, petitioners freely chose to teach at the school. Their discharge renders them no less free to seek employment in an open market than they were before their employment at the school.

Whether cast in the light of their argument that Massachusetts has legislated an inherently public function or in the context of their modified view of the Court's narrow public function definition, all of petitioners' claims have the inexorable effect of removing or eliminating the state action requirement. Their argument that the school performs an inherently public function ignores the strict definitional framework the Court has fashioned for the doctrine's application. The assertion is an example of the "pervasive potentialities" of a doctrine that, by its very terms, is "vague and amorphous" and admits of no limitation. *Evans* v. *Newton*, 382 U.S. 296, 322 (Harlan, J., dissenting). Their alternative claims that the public funding of special education renders it a state monopoly because a child is unable to obtain his/her rightful education without either state assistance or private money is tautological. It makes every publicly funded program a state "monopoly" by definition. By ignoring the private alternatives, it assumes they do not exist. Thus, it eliminates "exclusivity" as an essential element of the doctrine and removes any meaningful guidelines for the doctrine's application. Finally, by claiming that the constitutional interests at stake must be balanced in considering state action, regardless of the inadequacy of traditional indicia of state action, petitioners do away with state action altogether. But state action is not one of a number of ingredients in a formula. It is a threshold inquiry. The Fourteenth Amendment requires its

presence. It is either there or it is not. It cannot be satisfied by reference to the merits of the constitutional claims, assuming it *is* there. Without state action, there are no constitutional claims to consider.

After an exhaustive and meticulous analysis, the First Circuit found that the traditional state action tests had not been met. Petitioners novel approaches do not undermine the soundness of the lower court's judgment and should not be adopted. Since the state action requirement has not been met, the constraints of the Fourteenth Amendment cannot be considered in this context and the school should remain free to render independent judgments regarding its own program, including judgments regarding its personnel.

Argument

I. The Public Function Doctrine Of State Action Does Not Transform This Private School Into A State Actor.

As this Court has repeatedly maintained since *The Civil Rights Cases*, 109 U.S. 3 (1983), federal enforcement of the prohibitions of the Fourteenth Amendment[21] are strictly limited to those acts or laws committed "under State authority". 109 U.S. at 13. The reach of the Fourteenth Amendment is unquestionably not to render all "relations between individuals a matter of federal concern"[22] but rather to constrain the state and the state alone from infringement of the cherished civil rights that the Fourteenth Amendment protects. The state action requirement then arises out of the fundamental nature of the Fourteenth Amendment: it is state-sanctioned wrongdoing, not the private acts of private individuals that is prohibited. In the words of the Court,

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[21] At issue there, as here, was the "state action" requirement of the Fourteenth Amendment. Section of the Fourteenth Amendment provides, in pertinent part,

> "No state shall ... deprive any person of life, liberty, or property, without due process of law ..."

[22] *Henkin, "Shelley* v. *Kraemer:* Notes for a Revised Opinion," 110 U. Pa. L. Rev. 473, 475 (1962).

> "Civil rights, such as are guaranteed by the Constitution against State agression, cannot be impaired by the wrongful acts of individuals, unsupported by State authority in the shape of laws, customs, or judicial or executive proceedings. The wrongful act of an individual, unsupported by any such authority, is simply a private wrong, or a crime of that individual . . . but if not sanctioned in some way by the State . . . [the victim's] rights remain in full force, and may presumably be vindicated by resort to the laws of the State for redress . . . Hence, in all the cases where the Constitution seeks to protect the rights of the citizen against discriminative and unjust laws of the State by prohibiting such laws, it is not individual offenses, but abrogation and denial of rights, which it denounces, and for which it clothes the Congress with power to provide a remedy. This abrogation and denial of rights, for which the States alone were or could be responsible, was the great seminal and fundamental wrong which was intended to be remedied." *Civil Rights Cases*, 109 U.S. 3, 17-18 (1883).

In recent years, the Court has reaffirmed this fundamental principal by focusing on the connection between the specific act complained of and state responsibility for it. This is the familiar edict of *Jackson* v. *Metropolitan Edison Co.*, 419 U.S. 345 (1974) that there must be "a sufficiently close nexus between the state and the challenged action of the regulated entity so that the action of the latter may fairly be treated as that of the state itself". *Id.* at 351. See also, *Moose Lodge No. 107* v. *Irvis*, 407 U.S. 163 (1972). Only a few cases have focused on the more abstract institutional relationship between the private entity and the state without regard to the specific act complained of. In these cases, the Court has recognized two distinct approaches. The first, articulated in *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715 (1961) and recognized but distinguished in *Jackson* was the "intertwinement" or "symbiotic relationship" test whereby extensive regulation and performance of a public service might show such a "symbiotic

relationship"[23] between the private entity and the state that "the state will be held responsible for conduct with which it had no direct connection."[24] The second so-called public function doctrine is an inverted version of the same approach, namely that the state has delegated to a private entity a function so closely associated with the state, so "traditionally exclusively reserved to the State",[25] that the private entity must be said to *be* the state and therefore assume its constitutional obligations.

Petitioners do not contest the lower court's ruling and analysis on either *Jackson's* "nexus" approach or *Burton's* "intertwinement" approach. Indeed, it must be taken as conceded, as the First Circuit concluded after an exhaustive and meticulous examination of respondent's particular institutional characteristics, its level of state funding and regulation and the nature of the services provided, that there was neither a sufficient showing of state involvement in the dismissal nor the kind of institutional "intertwinement" necessary to meet the *Burton* test.

> "... [T]hese factors, altogether as well as separately, do not demonstrate that the state has so dominated the school as to make all the school's actions, and particularly those related to personnel, attributable to the state. The school's management by a private Board of Directors on which the state is not represented, and the broad range of independent discretion which these directors appear to exercise particularly in personnel matters, belie the notion of state domination." *Rendell-Baker*, Id. at 27.

In conceding the lower court's analysis and conclusion, petitioners become wholly reliant upon an expansive verson of the "public function" approach.[26] They claim that the state has delegated such an inherently "public function" to respondents that respondents

[23] *Moose Lodge*, 407 U.S. at 175; *Jackson*, *Id.* at 357.

[24] *Downs* v. *Sawtelle*, 574 F.2d 1, 8-9 (1978).

[25] *Jackson*, 419 U.S. at 352.

[26] In this they have apparently conceded the threshold requirement of state action under all traditional tests the Court has enunciated.

must be held to the same constitutional obligations as the state in carrying out that function, including the appropriate procedural prerequisites before discharge of employees.[27]

The Court has already characterized the cases in which the public function doctrine has been applied as a "limited line of cases" eliciting criteria "not susceptible of definition and form[ing] an unsatisfactory test."[28] In the context of claims by beneficiaries of a quasi-monopolistic private utility service to pre-shut-down due process hearings, the Court expressly rejected any expansion of the doctrine "into a broad principle that all business 'affected with the public interest' are state actors in all their actions." *Jackson*, 419 U.S. at 353. Here, where the claimants are not the beneficiaries of the service in question but employees asserting due process enhancements to their employment by a non-monopolistic private school, the Court should again reject any expansion of the doctrine.

A. *No Public Function Has Been Delegated to Respondents Within the Meaning of the Doctrine.*

The public function doctrine, to the limited extent of its application, has been restricted to a few select activities under unusual circumstances. Indeed, its unambiguous application has only occurred when the private entity assumed all the characteristics of a municipality or performed a function which has the effect of wholly controlling the political process and thereby taken on a similar assumption of power. *Nixon* v. *Condon*, 286 U.S. 73 (1932); *Smith* v. *Allwright*, 321 U.S. 649 (1944); *Marsh* v. *Alabama*, 326 U.S. 501 (1946); *Terry* v. *Adams*, 345 U.S. 461 (1953). In *Marsh*, every aspect of the "municipal" functioning of Chickasaw, Alabama — provision of utilities, sewage, mainten-

[27] Petitioners also assert that even if not inherently a public function, they meet the Court's "traditional" and "exclusive" tests. But as will be demonstrated, this argument is but a reiteration of their inherent public function approach. See *I.B.* below.

[28] *Jackson*, 419 U.S. at 353, citing with approval the language of *Nebbia* v. *New York*, 291 U.S. 502, 536 (1934).

ance of roads and other "common areas" etc. — was owned and operated by Gulf Shipbuilding Corporation. There, with emphasis on the company's treatment of the streets as "public" in the sense that it had not otherwise restricted access to them, the Court found state action in the company town's restrictions against distribution of religious literature. *Nixon*, *Smith* and *Terry* (the election cases) all involved delegation to a private organization of the conduct of local elections whose practical effect was the election of all local officials. In *Nixon* and *Smith*, the delegation of this authority was made after holdings that the manner in which the state had previously conducted such elections was impermissible.

Since *Terry*, the Court has applied the doctrine in only one other regard, but that holding was thereafter discredited and then expressly overruled. In *Amalgamated Food Employees Union Local 590* v. *Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968), state action was found in the operation of a private shopping center when the activity (labor picketing) was related to the purpose for which there was public access. Four years later, the Court's ruling in *Lloyd Corporation* v. *Tanner*[29] implicitly overruled *Logan Valley*. This was followed by an express overruling in *Hudgens v. N.L.R.B.*, 424 U.S. 507 (1976). *Hudgens* affirmed that the doctrine had little application except in unusual circumstances such as *Marsh's* streets of a company town and *Smith's* party nominating procedures. The Court adopted Justice Black's long-held view that the public function doctrine applied only to where the entity "took on all the attributes of a town" and apparently to nothing else. *Marsh*, 326 U.S. at 502.

Marsh and the election cases have a common thread essential to both holdings: the state had wholly relinquished its responsibility by the simple expedient of either withdrawing from the scene or in

[29] 407 U.S. 551 (1972). *Lloyd* rejected the doctrine's application to satisfy state action where there was an anti-war demonstration at a private shopping center. It was apparently because there was room to distinguish the labor picketing in *Logan Valley* from the anti-war demonstration in *Lloyd* on the grounds that the former was related to the purpose for which the shopping center was open to the public while the latter was not that *Hudgens* expressly disposed of *Logan Valley*. See *Hudgens*, 424 U.S. particularly at 518 et. seq.

the unusual circumstances of *Marsh*, never having been there in the first place. These cases are on one extreme of the broad spectrum of state action cases the Court has confronted: where the State, either by a totally passive inaction or an affirmative abdication of responsibility permits all of the fundamental power obligations common to a municipality to fall into private hands, it cannot be allowed to thereby avoid the strictures of the Fourteenth Amendment.[30]

In this critical sense, these circumstances are far different from those where the doctrine has been applied. Whether in the sense of absence (*Marsh*) or affirmative abdication, the state has not made a "delegation" to respondents in the manner that the doctrine requires. Indeed, the very nature of the statutory scheme compels a contrary conclusion. Rather than a "delegation" of an on-going state obligation to the private sector, the statute, as applied to private providers like respondents, represents a financial responsiblity and obligation the state need not have assumed. The major thrust of the law is to greatly expand the provision of special education by the public sector and to set forth procedures for their

[30] It is the lack of this total abdication which distinguishes this Court's decision in *Evans* v. *Newton*, 328 U.S. 296 (1966). There the state's abdication of control over a local park to a private trustee was not real but in the nature of a ruse to expressly defy Fourteenth Amendment requirements. In its opinion the Court emphasized that for decades prior to institution of the suit, the city had totally maintained the "whites only" park as a public facility, and found that, even though just prior to suit, private parties had replaced the City as trustee of that park, the City still exercised total control over and maintenance of the park. Indeed, the Court has stated that: "We think *Newton* rests on a finding of ordinary state action under extraordinary circumstances. The Court's opinion [in *Newton*] emphasizes that the record showed 'no change in the municipal maintenance and concern over this facility', after the transfer of title to private trustees. That transfer had not been shown to have eliminated the actual involvement of the City in the daily maintenance and care of the park". *Flagg Bros., Inc.* v. *Brooks*, 436 U.S. 149, 159, fn.8 (1978). The lesson of *Newton*, as the lower court stated, is that "should a public institution be placed in private hands with the actual purpose of evading constitutional requirements, the courts may look beyond the formal structure of the institution to find other indicia of state involvement." *Rendell-Baker*, 641 F.2d at 23. Of course, this approach is not relevant for consideration here.

appropriate delivery. M.G.L. c. 71B, § 1 et. seq. It is in that context that the legislature recognized the reality that localities had limited capabilities to assume this responsibility and often had neither the capability nor the public facilities for it. It is for this reason that the legislature provided a mechanism for contracting for services with private schools such as respondents.[31] The legislative goal was not to withdraw from a service it had provided or circumvent its obligation by placing a private actor in its stead. Rather, its goal was to ensure quality special education regardless of public availability through the mechanism of purchase of service contracts.

It was in part because of the Court's view that the public function doctrine contemplated an abdication of an on-going state responsibility to a private entity that the Court rejected its application in both *Jackson* and the more recent *Flagg Bros.* v. *Brooks*, 436 U.S. 149 (1978). For example, *Jackson* suggests the doctrine might be applicable were the state to abdicate its eminent domain function. *Jackson*, 419 U.S. at 353. The court's commentary related not merely to the nature of the function but to the sense of relinquishment. It was in this regard that the Court reserved judgment in *Flagg Bros.*, "as to the extent, if any, to which a city or state might be free to delegate to private parties the performance of such functions [as education, police and fire protection and tax collection] and thereby avoid the strictures of the Fourteenth Amendment."[32] Nothing in *Flagg Bros.* intimates the Court's

[31] M.G.L. c. 71B, § 4 provides in pertinent part:

> "The school committee of any city, town or school district may, to meet its obligations under section three, with the approval of the department enter into an agreement with any other school committee to jointly provide special education or, subject to the consent of the parent or guardian affected thereby and subject to constitutional limitations, may enter into an agreement with any public or private school, agency or institution to provide the necessary special education within the city, town or school district."

[32] *Flagg Bros., Id.* at 163-164. Petitioners rely upon this quotation to suggest that the question of application of the public function doctrine to these circumstances was left open in *Flagg Bros.* But the Court's emphasis was clearly on the aspect of "active" delegation by the state, not the nature of the function.

interest in subjecting to constitutional scrutiny state enacted purchase of service relationships with private entities merely because the private entity might be involved in one of the named functions. If anything, the Court has consistently maintained the view that state enhancement of its services through purchase of services outreach to the private sector should not, in the absence of direct control, constitute a basis for state action.[33] For purposes of what *Flagg Bros.* had in mind, this case would be analytically distinct had Brookline terminated its direct provision of all educational services and contracted out the provision of secondary education to private schools. Since the reverse is true — Brookline has been compelled to expand its services into the special education field, but has been permitted to do so in part by contracting with private schools to accomplish its task — this case does not fall within the contemplation of the doctrine at all.

B. *Special Education is not a Function Traditionally and Exclusively Reserved to the State.*

It is no accident that this Court has imposed a strict definitional framework to the public function doctrine and has kept it within "carefully confined bounds." *Flagg Bros.*, 436 U.S. at 164. Both the range of government activities which could be called "public" as performed in private hands and the imprecision of the term itself render the doctrine a "slender analytical reed upon which to lean, for it admits of practically no limitation"[34] and thus an "unsatisfactory test:"[35]

> "It substitutes for the comparatively clear and concrete tests of state action a catch-phrase approach as vague and

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[33] *Rendell-Baker, supra* at 25; *Jackson, supra;* Cf. *Meyer* v. *Nebraska*, 262 U.S. 390 (1923) and *Polk County* v. *Dodson*, 50 U.S.L.W. 4077 (December 14, 1981).

[34] *Milner* v. *National School of Health Technology*, 409 F. Supp. 1389, 1393 (E.D. Pa. 1976), citing *Isaacs* v. *Board of Trustees of Temple University*, 385 F. Supp. 473 (E.D. Pa. 1974).

[35] *Jackson*, 419 U.S. at 353, citing with approval *Nebbia* v. *New York*, 291 U.S. 502, 536 (1934) which rejected a substantive due process claim on the basis of the vagaries of terms such as "affected with a public interest" and "clothed with a public use."

> amorphous as it is far-reaching. It dispenses with the sound and careful principles of past decisions in this realm. And it carries the seeds of transferring to federal authority vast areas of concern whose regulation has wisely been left by the Constitution to the States." *Evans* v. *Newton*, 382 U.S. at 322, Harlan, J., dissenting.

Thus, when the Court adopted a severely circumscribed definitional framework for its application it did so in contemplation that it would be rarely applied. It is axiomatic that much of institutional life, and a good deal of the human condition, is affected by state funding and/or regulation: "Mere receipt of financial subsidy and subjection to some regulation are the conditions of much of our societal life." *McQueen* v. *Drucker*, 438 F.2d 784, 791 (1st Cir. 1971).[36] Conversely, "[t]here are few institutionalized activities which touch the public welfare which the modern state would not, or even has not, taken over somewhere in the absence of private operation." *Pendrell* v. *Chatham College*, 370 F. Supp. 494, 497 (W.D. Pa. 1974). Only where "powers traditionally exclusively reserved to the state"[37] are delegated to a private entity may the doctrine be applied.[38] Since the function respondents per-

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[36] Quoted with approval in *Rendell-Baker*, *supra* at 25.

[37] *Jackson*, 419 U.S. at 351.

[38] Petitioners contention that this Court has not foreclosed the proposition that public education is an inherently "sovereign function for state action purposes" (Petitioners' Brief at p. 18) is without merit. First, this Court has never recognized any function inherently "sovereign" without reference to a definitional framework. Second, petitioners reliance on *Ambach* v. *Norwick*, 441 U.S. 68 (1979) is irrelevant because there was no issue there of state action. Finally, petitioners' assertion ignores the Court's long history of refusing to define as "public" or "sovereign" a private endeavor because the government also happens to engage in it. See *Jackson*, 419 U.S. at 353, fn.9. The public function doctrine is difficult enough to define. See *Jackson*, 419 U.S. at 353, citing with approval *Nebbia* v. *New York*, 291 U.S. 502, 536 (1936). To ignore the definitional requirements *Jackson* and *Flagg Bros.* impose would open the door to the unlimited possibilities for the reach of the doctrine that Mr. Justice Harlan so feared in his dissent in Newton. Indeed, by utterly failing to distinguish between public education and special needs education and claiming that the latter is encompassed by the former, petitioners embrace the very amorphous qualities of the doctrine the Court has striven to avoid.

form, quite apart from the process by which it devolved upon them (see Argument *I.A.* above), is neither a traditional or exclusive state function, this is not one of those rare cases for the doctrine's application.

Whether the purported government function is characterized as "public education" or "special needs education,"[39] there can hardly be dispute that the power is not one "traditionally associated with sovereignty."[40] The very passage of Chapter 766 in 1972 is evidence enough of that. Indeed, it was precisely because public schools had *not* traditionally educated special needs children that Chapter 766 was enacted: "[I]t is only recently that public school systems have assumed any responsibility for children with special needs; until a few years ago such children were routinely excluded from public schools." *Rendell-Baker*, 641 F.2d at 26.[41] Contrary to petitioners' contention, prior to 1974 education of special needs children in the public sector had been either non-existent or circumscribed in the extreme.[42] And whatever efforts were made by the state, they did not alter the historical reality that education

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[39] Petitioners characterize respondents' function as "public education" and proceed to assert its inherently "sovereign" characteristics and its "critical mission" in our social fabric. Petitioners' Brief at 19-20. But to emphasize its value does not render it "sovereign" any more than electricity was in *Jackson*. Moreover, this approach clouds the issue. It is the nature of the power that is at issue, not the nomenclature. Here the nature of the power is a specialized branch of education made publicly fundable in 1974. Unless a function can become "traditionally associated with sovereignty" merely by the sovereign declaring it so, respondents' function can hardly be described in this manner.

[40] *Jackson*, *supra* at 353. But see *Flagg Bros.* which expressly rejected the Second Circuit's view that "state action might be found in the exercise of 'some power delegated to it by the State which is traditionally associated with sovereignty.' " *Flagg Bros.*, *supra* at 155.

[41] Generally, such children were excluded from the compulsory education law. M.G.L. c. 76, § 1 (St. 1939, c. 461 as amended). But Chapter 766, (St. 1972, § 12) subjected this exclusion to § 3 of the new law (M.G.L. c. 71B, § 3).

[42] See, e.g. the earliest statutory endeavor, St. 1919, c. 277.

of special needs and handicapped children remained predominantly in private hands until the very recent past.[43] In any case, "[e]ven near complete government funding does not turn a private charitable and educational institution into a public entity so long as the private institution remains free, in fact, to control its own affairs." *Rendell-Baker*, 641 F.2d at 25. Finally, perhaps the best means of testing the requirement of "tradition" is to ask whether the service or function in question is so intimately related to our historic notions of "state-ness" that it would be supplied by the state but for the existence of the private counterpart. No reasonable view of the state's role could supply an affirmative answer. The need for and the importance of special education are beyond question. However, partial assumption of state fiscal responsibility of this service simply can not be viewed on the same level of importance as such essential functions as police, fire or eminent domain. This is not a service "of such public importance that the State invariably either provides the service itself or permits private companies to act as state surrogates in providing it." *Jackson*, 419 U.S. at 372 (Marshall, J., dissenting).

Perhaps more crucial is the failure to meet the requirement of exclusivity. As the Court stated in *Flagg Bros.*, "While many functions have been traditionally performed by governments, very few have been 'exclusively reserved to the State' ". *Flagg Bros.*, 436 U.S. at 158. In reviewing the two lines of cases where the public function was applied — the election cases on one hand and *Marsh* on the other — the Court saw the critical common element as "the feature of exclusivity". *Flagg Bros.*, 436 U.S. at 160. The Court went on to distinguish the dispute resolution function at issue in *Flagg Bros.* on that basis: unlike the political office seeker in *Terry* or the member of Jehovah's Witnesses who wished to distribute literature on the streets of the company town in *Marsh*, the creditor and debtor in *Flagg Bros.* had a wide range of choices in "resolving this purely private dispute." *Id.* at 160.

[43] For a detailed historical analysis, see Brief for Amicus Curiae, the Massachusetts Association of the 766 Approved Private Schools, Inc.

The lesson of *Flagg Bros.* is that the exclusivity requirement must be satisfied in two distinct ways. First, the private institution must wield a monopolistic government power. Second, it must wield that power in respect to the beneficiaries of the service it provides.[44] In neither sense that *Flagg Bros.* defines it is the exclusivity requirement satisfied here.

There is no support whatsoever for the assertion that respondents, or for that matter any other private special education school providing services under Chapter 766, wield monopolistic government power in the provision of educational services. In this regard, the role of respondents is no different from any privately run secondary school, whether servicing Chapter 766 children or not. As to *all* children, Massachusetts has taken upon itself the responsibility of providing a sufficient number of public schools. These children and their families are not only assured but required to obtain an education. See M.G.L. C. 76, § 1. The State has also taken upon itself the responsibility of providing a publicly supported education for students with special needs. Compare 71 M.G.L., § 1 with 71B M.G.L., §§ 2, 3. But neither obligation creates the expectation or the requirement that the state assume exclusive monopolistic authority.[45] As *Jackson* stated in rejecting the Court's application of the public function doctrine to public education:

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[44] More accurately, the power must be wielded against those who are would-be beneficiaries but have been excluded from it. See *Choper*, "Thoughts on State Action: The 'Government Function' and 'Power Theory' Approaches", 1979 Washington University Law Quarterly 757.

[45] Petitioners argue that statutory creation of a right to special education creates an expectation and entitlement to such a State supported service, with attendant constitutional obligations which cannot be delegated and are just as worthy of recognition and fulfillment as traditional and exclusive public functions. Petitioners' Brief, p.18 et. seq. In this manner they assert that Massachusetts may establish special needs education as a "legislatively-declared sovereign function." Brief at 21. But state action is a threshold inquiry engaged in and determined by the federal judiciary and penultimately this Court, not the Massachusetts legislature. Thus, their assertion ignores the reality that it is this Court's tradition and exclusivity tests that must be met. Moreover, even if considered, the argument ignores two fundamentals of federalism. First, the Supremacy Clause would

> . . . "It is difficult to imagine a regulated activity more essential or more 'clothed with the public interest' than the maintenance of schools, yet we stated in *Evans* v. *Newton*, 382 U.S. 296, 300, 86 S.Ct. 486, 15 L.Ed.2d 373 (1966):
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> > 'The range of government activities is broad and varied, and the fact that government has engaged in a particular activity does not necessarily mean that an individual entrepreneur or manager of the same kind of undertaking suffers the same constitutional inhibitions. While a State may not segregate public schools so as to exclude one or more religious groups, those sects may maintain their own parochial educational systems.' " *Jackson*, 419 U.S. at 353, fn.9.

In this same vein, it goes without saying that children in the Commonwealth may and do attend private or parochial schools to fulfill their statutory obligation.[46] So too may children with special needs — at their own expense and not within the statutory framework of Chapter 766. Moreover, if they do seek a publicly funded program, a special needs educational plan devised for a child is "subject to the consent of the parent or guardian affected thereby" M.G.L. Ch. 71B, § 4. If a child's parents do not agree with the educational plan devised by the state, they are free to provide their child, at their own expense, with an alternative educational program. Alternatively, they may decide to keep their child in a regular public school setting or to opt for a public school

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wholly negate such a claim. Second, when the State creates an entitlement, it is the State which has the right to define the expectations surrounding that entitlement. Thus, great deference must be given to Massachusetts' failure to afford teachers in private special education programs any of the procedural rights afforded all public school teachers. *Bishop* v. *Wood*, 426 U.S. 341 (1976); *Arnett* v. *Kennedy*, 416 U.S. 134 (1974); *Board of Regents* v. *Roth*, 408 U.S. 564 (1972) See M.G.L. c. 71, § 41 *et. seq.*

[46] Education "has never been a state monopoly in this country, even at the primary and secondary levels." *Powe* v. *Miles*, 407 F.2d 73, 79 (2d Cir. 1968); *Jackson*, 419 U.S. at 353, fn.9.

special needs program not recommended by the school committee.[47] The existence and vitality of these alternatives is the best proof that the function is not monopolistically held. It is just such freedom of choice that the state action concept implicitly preserves and which compels a close confinement of the public function doctrine. Petitioners' claim that these circumstances compel the student to choose between a suitable education and a public education and that only with respondents can a suitable and "public" education be obtained is no more than an assertion that the state has a monopoly on publicly funded programs.[48] By defining "monopoly" as a monopoly in the public sphere, petitioners ignore the obvious private alternatives and ask the Court to adopt a meaningless redundancy as a basis for the doctrine's application. It is comparable to asserting in *Flagg Bros.'* context that because the state had established a "public right" to resolve disputes, the debtor's inability or failure to exercise this right without regard to the private alternatives demonstrated a state monopoly on the function. Were there *any* other means of distributing religious literature in the streets of Chippewa, Alabama or *any* other avenue for gaining office in Fort Bend County, Texas, the results in *Marsh* and *Terry* surely would have been different. But, just as the debtor in *Flagg Bros.* could have exercised the purely private remedy of "seeking a waiver of *Flagg Brothers'* right to sell her goods at the time she authorized their storage,"[49] the students at respondents' School had alternative means for obtaining special needs education in the Commonwealth.[50] Moreover, *Flagg Bros.*

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[47] M.G.L. c. 71B, § 3; *Amherst-Pelham Regional School Comm.* v. *Department of Education*, 376 Mass. 480, 381 N.E.2d 922 (1978).

[48] Petitioners' Brief, p. 24-25.

[49] *Flagg Bros.*, *supra* at 161.

[50] While respondents population is comprised of all publicly funded students, the population of other such schools is more evenly divided between children referred and paid for by the state and children referred by and paid for by their parents or guardians or those on privately endowed scholarships. See Brief of Amicus Curiae.

clearly establishes that where state-based legal remedies are available, the exclusivity requirement is not satisfied. The debtors in *Flagg Bros.* not only had their self-help "private" option of requiring a waiver. The Court also recognized their legal remedy, after the taking, of an action in replevin. Even these legal remedies were foreclosed in *Marsh*, *Terry*, *et al.* But under Chapter 766, the students and their families have built in legal remedies regarding any conflict over an appropriate placement for their special education. M.G.L. c. 71B, § 4, 10. Thus, the respondent school, far from being monopolistic, is but one of many options for the class of individuals it serves. Armed with numerous substantive alternatives as well as built-in legal remedies, these special needs children can hardly be deemed a captive audience.

But petitioners are not even the beneficiaries of the service provided. Thus, the second aspect of *Flagg Bros.*' exclusivity requirement fails here as well. That is, the purported monopolistic function has not been exercised directly in respect to the purported beneficiaries of the service being provided.[51] It is only in regard to specific aspects of its activities, namely those that are involved in the exercise of its monopolistic government-like powers, that the private entity may be exposed to the public function doctrine. For example, the holding in *Marsh* would not bar Gulf Shipbuilding Corporation from firing a factory worker without notice and a hearing. If the claim in *Jackson* were made by a black applicant for a clerical job at Metropolitan Edison Company, he could not claim Fourteenth Amendment state action in that discriminatory policy.[52] A finding here that a private school's dismissal of its teachers constitutes state action would represent a significant

[51] This was not an express holding in *Flagg Bros.* but implicit in the Court's discussion of the meaning and importance of the exclusivity requirement. *Id.* at 160.

[52] See *Choper*, Id. at 781. Obviously, these hypotheticals serve to highlight state action analysis only. The factory worker might have some recourse or remedy at state law. The black applicant would have an independent federal cause of action under Title VII of the Civil Rights Act of 1964 as well as his state remedies, if any.

extension of the public function doctrine into the "collateral aspects of that function". *United States* v. *Wiseman*, 445 F.2d 792, 796 (2d Cir. 1970), *cert. denied*, 404 U.S. 967 (1971). As applied here, the challenged exercise of power — dismissing teachers — must be directly related to the exercise of the exclusive power respondents wield. But respondents not only were not acting with exclusive force, they were not acting in respect to the beneficiaries of the program, i.e., the students:

> "The 'public function' concept is strongest, moreover, when asserted by those for whose benefit the state has undertaken to perform a service, or when the state has lent its coercive powers to a private party. In this situation, for example, those students of the New Perspectives School who were placed there by their local school committee, particularly those who are compelled to attend under the state's compulsory education laws, would have a stronger argument than do plaintiffs that the school's action *towards them* is taken 'under color of' state law, since the school derives its authority over them from the state." *Rendell-Baker*, *supra* at 26. (emphasis in text).

This simple distinction highlights the fragility of petitioners' position. Petitioners were under no compulsion to teach at the school. The school hasn't the remotest degree of market exclusionary force on special needs teaching positions.[53] Access to employment through a free market was and is still available to petitioners. They choose to teach special needs children in a private school rather than a public school setting:

> "Plaintiffs in this suit, however, are not the intended beneficiaries of the service for which the state has contracted

[53] A major function of the Fourteenth Amendment's state action provision is 'to regulate the exercise of centralized power — the kind of power that might be consciously employed to foreclose individual competition in a free market' ". *Choper*, *Id.* at 766, quoting Winter, Changing Concepts of Equality: From Equality Before the Law to the Welfare State, 1979 Wash. U.L.Q. 741, 744.

> with the school. The school's authority over its faculty derives from the contractual relationship of employment, not from 'state law'. The school does not perform any public function toward them . . .". *Rendell-Baker, supra* at 26.

Thus, for public function doctrine purposes, teachers are quite distinct from the beneficiaries of the function they provide.[54] The respondents cannot and did not take action toward petitioners with state-vested authority. Petitioners' status was that of private employees with rights, if any, arising under state law.[55]

Respondents, like other private and parochial schools are an important part of the educational system in the Commonwealth. In a real sense, these private schools aid the state in discharging its statutory responsibility to provide compulsory education to all children. But in aiding the state in performing an important function they do not thereby become state actors. The only distinctive characteristic of respondents is that its students are special needs children whose education is largely publicly funded. By petitioners' thesis, any school that accepts public funding for even one such student would necessarily be transformed into a state actor.

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[54] This is altogether different of course from those cases which affirm the important role of teachers in our public educational systems and the protection that must be afforded their constitutional rights, particularly where First Amendment free speech is implicated. See *Shelton* v. *Tucker*, 364 U.S. 479, 487 (1960); *Keyishian* v. *Board of Regents*, 385 U.S. 589, 603 (1967). But these issues were confronted in the context of unquestioned state action. Unless and until state action renders that Amendment applicable, it cannot be addressed by the federal courts. See Argument II below.

[55] In this regard, they may have contractual rights under rulings which hold that a discretionary employee has a right not to be dismissed in bad faith. See *Fortune* v. *National Cash Register Co.*, 373 Mass. 96, 364 N.E.2d 1251 (1977). Moreover, petitioners in *Klug* have already exercised their right to petition the Massachusetts Labor Relations Commission under M.G.L. c. 150A, § 2 and 4(3). See respondents' Motion to Dismiss or Stay Proceedings, J.A. 80-81. These provisions provide for administrative agency review for claims of employer discrimination, including discharge, where such acts were purportedly designed to discourage union organizing or membership.

But

> "... a school for the deaf or the blind, managed by an all-private board, does not surrender its rights to pursue independent policies merely because the students are on state-funded scholarships. Even near complete government funding does not turn a private charitable and educational institution into a public entity so long as the private institution remains free, in fact, to control its own affairs". *Rendell-Baker, Id.* at 25.

To adopt the criteria of public-funding as the sole requirement of state action would render the state action concept meaningless and expose every state-funded service — even the private school with but one special needs child[56] — to judicial scrutiny and congressional regulation. The "pervasive potentialities" of the doctrine Mr. Justice Harlan found so fearfully "vague and amorphous" would be realized.[57] Every time the state funded a service in private hands, the private actor would be transformed into a state actor and the doctrine would instantly "reach privately owned orphanages, libraries, garbage collection companies, detective agencies, and a host of other functions commonly regarded as nongovernmental through paralleling fields of governmental activity ... whose regulation has wisely been left by the Constitution to the States."[58]

To draw a line of public function application so as to include New Perspectives School and exclude other traditional private and parochial schools, including other private special needs schools, has no rational basis. Creation of a publicly supported education for students with special needs did not transform the private provider into a state actor any more than creation of a public school system transformed the traditional private or parochial school into a state actor.

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[56] The Massachusetts Department of Education guidelines by which the School is in part regulated "apply to any school at which a locality seeks to place even a single child under Chapter 766; the Department appears to contemplate placement of some children in schools whose other students are all privately funded". *Rendell-Baker, Id.* at 25.

[57] *Evans* v. *Newton*, 382 U.S. at 321-2 (Harlan, J., dissenting).

[58] *Evans* v. *Newton*, 382 U.S. at 321-2 (Harlan, J., dissenting).

II. In The Absence Of State Action, There Are No Constitutional Rights Infringed. Therefore, No "Appropriate Balancing" Of Constitutional Rights Can Occur.

Petitioners take the novel view, never seriously considered by the Court before, that state action is not, as the Fourteenth Amendment would have us suppose, a threshold prerequisite to federal judicial scrutiny of respondents' acts. Rather, they assert that where there are "substantial indicia of state action",[59] though inadequate to meet *any* of the Court's enunciated tests, it is appropriate, before a state action claim is foreclosed, to identify and weigh "the competing constitutional interests at stake".[60] Having enunciated their own rule of constitutional analysis, petitioners proceed to "identify" the "competing constitutional interests" and "weigh" them with predictable results.

Petitioners argument rests on the thesis that state action is not an issue at all since "whenever, and however, a state gives legal consequence to transactions between private persons, there is state action."[61] Since there is some state action in virtually every transaction between individuals, a review of the competing interests at stake would necessarily occur. Thus regardless of the actual degree of state action, the substantive claims would be considered as part of the jurisdictional determination.

What is wrong with this analysis is that it ignores the central feature of the Fourteenth Amendment. In the absence of state action, there are *no* constitutional rights being infringed. State

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[59] Petitioners' Brief, p. 26, Argument B.1. and B.2., see especially B.2. at p.34, et. seq.

[60] Petitioners' Brief, p. 35.

[61] Horowitz, *The Misleading Search for "State Action" Under the Fourteenth Amendment*, S. Cal. L. Rev. 208, 209 (1957). In a variety of modified guises, this is the theme of those commentators cited by petitioners in their Brief at footnote 31. For example, Glennon and Nowak urge state action whenever a private individual's conduct "is lawful within the state" "whether the state has explicitly authorized the challenged practice or simply allowed it to exist." *A Functional Analysis of the Fourteenth Amendment "State Action" Requirement*, 1976 Sup. Ct. Rev. 221, 230. But see *Choper*, Id. at 757 and especially 761 *et seq.*

action defines the point at which constitutional rights may be implicated in certain rules or conduct. State action either exists, in which case constitutional rights are implicated, or it does not exist, in which case they are not. It is not a test whose inadequacy can be overcome by reference to the importance of the substantive claims the very existence of which depend upon the threshold finding of state action. In short, without it, petitioners have no constitutional claims. Unless the threshold inquiry can be met, respondents' private acts, even if wrongful, are "simply a private wrong"[62] and cannot impair petitioners' constitutional rights.[63] Petitioners' theory,

> "... [b]y effectively obliterating the distinction between state action and private action ... eviscerate[s] the fourteenth amendment's restriction on the authority of the national government vis-a-vis the state regarding the regulation of the myriad relationships that occur between one individual and another. These approaches require that all private activity, except that small amount which is beyond all governmental control, conform to federal constitutional standards.
>
> Thus, at the intitiative of any litigant who is offended by another person's behavior, these theories would subject to the scrutiny of federal judges, under substantive constitutional standards customarily developed for measuring the actions of government, all sorts of private conduct that because of political constraints and collective good sense would probably never be mandated by law. Further, by permitting private actors to violate constitutional norms when they have a constitutionally protected liberty interest to do so, these theories would delegate to federal judges the power to implement the vague mandate of the due process clause in speaking the final word about the validity of virtually all transactions

[62] *The Civil Rights Cases*, 109 U.S. at 17.

[63] See e.g. Nolte, *State Action After Jackson* v. *Metropolitan Edison Co.: Analytical Framework for a Restrictive Doctrine*, 81 Dickson Law Review 315 (1977).

> between individuals. In doing so, the national judiciary would be required to determine whether private conduct was constitutionally immune from governmental control even though, because of general political sensitivity to individual autonomy, such private conduct probably would never be regulated by the state".[64]

Implicit in this fundamental objection is a more practical one. By permitting consideration of the substantive claims in their assessment of state action, the federal district courts would be compelled to hold a kind of "preliminary trial" before making the jurisdictional determination. Then, having identified, evaluated and weighed the substantive claims in a state action context, the process would be repeated in a more elaborate trial on the merits. Needless to say, the impact on the expeditious handling of § 1983 claims where a Fourteenth Amendment state action issue had been raised would be substantial.

In the absence of an adequate basis for state action, an absence petitioners apparently concede in their "balancing" argument, it is *respondents* constitutional right to free association, privacy and institutional autonomy that is at stake here.[65] If there is a balancing to be done, it is their rights which must be weighed against the purely private claim of petitioners to continuing employment. In petitioners' own words, "[t]he school's ability to provide services has been seriously hindered and in some cases halted altogether . . . All the staff agrees the students are not being served. The staff also agrees that its own fragmentation has been a source of these problems."[66] Respondents are a school for special needs students

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[64] *Choper*, Id. at 762. As *Choper* points out this approach to state action would also "empower federal legislators with vast authority under Section Five of the Fourteenth Amendment to establish a body of statutory rules governing many aspects of private affairs". *Id.* at 762.

[65] See *The Civil Rights Cases*, 109 U.S. (1883); *Olmstead* v. *United States*, 277 U.S. 438 (1928); *Roe* v. *Wade*, 410 U.S. 113 (1973).

[66] Exhibit A to *Klug* Complaint, J.A. 30-31. See also Paragraph 20 of the *Klug* Complaint, where petitioners concede that "[f]or at least the past one and a half years there has been considerable discord among the administration, faculty and students at the School . . ." J.A. 23.

unable to be serviced in a public school. The students are high school aged with a history of emotional problems and drug and alcohol abuse. Given the population the school accepted and the particular administrative problems petitioners concede had hindered or halted the school's entire educational program, respondents were and ought to be free to follow independent policies of their own choosing with regard to all internal matters. Viewed in this light, the school's associational and privacy rights in personnel matters, or indeed regarding any other matter related to the day-to-day administration of such an institution, cannot be overcome by petitioners' purported constitutional "interest" in attacking the personal and professional integrity of the respondents' Director and publicly calling for her resignation[67] free of jeopardy to their employment.

In summary, if petitioners are private teachers in a private school they have no constitutional right to due process or free speech which the school can infringe. It is only where respondents "action may fairly be said to be that of the state"[68] that these rights may be implicated. In the absence of state action, it would be wholly inappropriate and unprecedented to engage in a balancing process, since the nature of the rights and interests involved can only be assessed after a finding of state action. In short, it is not petitioners' due process and free speech claims that are before the court but their right to bring such claims before a lower court that is at issue. Unless and until such a right is recognized, no constitutional rights are implicated and no "balancing" can occur.

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[66] Exhibit A to *Klug* Complaint, J.A. 30-31. See also Paragraph 20 of the *Klug* Compalint, where petitioners concede that "[f]or at least the past one and a half years there has been considerable discord among the administration, faculty and students at the School . . ." J.A. 23.

[67] Joint Appendix, p.32 et seq., Exhibit B to *Klug* Complaint.

[68] *Shelley* v. *Kraemer*, 334 U.S. 1, 13 (1947).

Conclusion

For all of the above reasons, the judgment of the Court of Appeals in both *Rendell-Baker* and *Klug* should be affirmed and the cases dismissed.

Respectfully submitted,

MATTHEW H. FEINBERG*
85 Devonshire Street
Boston, MA 02109
Attorney for Respondents

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* Counsel of Record

APPENDIX A

Constitutional, Statutory, and Regulatory Provisions

CONSTITUTIONAL PROVISIONS

United States Constitution, Amendment XIV, Section 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTORY PROVISIONS

Massachusetts General Laws, Chapter 71B, Section 1:

The following words as used in this chapter shall, unless the context requires otherwise, have the following meanings: "Department", the department of education; "School age child", any person of ages three through twenty-one who has not attained a high school diploma or its equivalent; "School age child with special needs", a school age child who, because of temporary or more permanent adjustment difficulties or attributes arising from intellectual, sensory, emotional, or physical factors, cerebral dysfunctions, perceptual factors, or other specific learning disabilities or any combination thereof, is unable to progress effectively in a regular school program and requires special classes, instruction periods, or other special education services in order to successfully develop his individual educational potential; "Regular education", the school program and pupil assignment which normally leads to college preparatory or technical education or to a career; "Special education", educational programs and assignments, namely special classes, programs or services designed to

develop the educational potential of children with special needs including but not limited to educational placements of children by school committees, the departments of public health, mental health, and youth services and the department of social services in accordance with the regulations of the department of education; "School age child requiring special education", any child with special needs who requires special education as determined in accordance with the regulations set forth by the department.

St. 1972, c. 766, § 11, as amended by St. 1978, c. 552, § 18. (9 Mass. Gen. Laws Ann. 184-85 (West Supp. 1981).)

Massachusetts General Laws, Chapter 71B, Section 2:

The department shall promulgate, in cooperation with the departments of mental health, public health and social services, regulations regarding programs for children with special needs including but not limited to a definition of special needs; provided, however, that such definition shall emphasize a thorough narrative description of each child's developmental potential so as to minimize the possibility of stigmatization and to assure the maximum possible development of a child with special needs, and, provided further, that such definition shall be sufficiently flexible to include children with multiple special needs. Children receiving or requiring special education shall be entitled to participate in any of the following programs: (1) additional direct or indirect instruction consultation service, materials, equipment or aid provided children or their regular classroom teachers which directly benefits children requiring special education; (2) supplementary individual or small group instruction or treatment in conjunction with a regular classroom program; (3) integrated programs in which children are assigned to special resource classrooms but attend regular classes to the extent that they are able to function therein; (4) full-time special class teaching or

treatment in a public school building; (5) teaching or treatment at home; (6) full-time teaching or treatment in a special day school or other day facility; (7) teaching or treatment at a hospital; (8) teaching or treatment at a short or long term residential school; (9) occupational and pre-occupational training in conjunction with the regular occupational training program in a public school; (10) occupational and pre-occupational training in conjunction with full-time special class teaching in a public school building, at home, special day school or other day facility, hospital, or short or long-term residential school; (11) any combination or modification of programs (1) through (10) or other programs, services, treatments or experimental provisions which obtain the prior approval of the department.

Admission to such programs on the pre-school level at an earlier age than at which schooling is ordinarily provided shall be regulated by the department in conjunction with the departments of public health and mental health and shall be restricted to children with substantial disabilities who are judged by said departments to require such programming.

No child shall be assigned to a special education class unless it is first determined by an evaluation of the child's needs and the particular special education program that the child is likely to benefit from such program; periodically thereafter, and in no event less often than annually the child and his program shall be reevaluated to determine whether said child is benefiting from said program in accordance with the procedures set forth in section three. In the event that said program is not benefiting the child and that another program may benefit the child more, or said program has benefited the child sufficiently to permit reassignment, the child shall be reassigned, and in the event of consistent failure of a program to benefit children there assigned, the program shall be abolished or altered.

St. 1972, c. 766, § 11, as amended by St. 1978, c. 552, § 19. (9 Mass. Gen. Laws Ann. 187-88 (West Supp. 1981).)

Massachusetts General Laws, Chapter 71B, Section 3:

In accordance with the regulations, guidelines and directives of the department issued jointly with the departments of mental health and public health and with assistance of the department, the school committee of every city, town or school district shall identify the school age children residing therein who have special needs, diagnose and evaluate the needs of such children, propose a special education program to meet those needs, provide or arrange for the provision of such special education program, maintain a record of such identification, diagnosis, proposal and program actually provided and make such reports as the department may require. Until proven otherwise, every child shall be presumed to be appropriately assigned to a regular education program and presumed not to be a school age child with special needs or a school age child requiring special education.

No school committee shall refuse a school age child with special needs admission to or continued attendance in public school without the prior written approval of the department. No child who is so refused shall be denied an alternative form of education approved by the department, as provided for in section ten, through a tutoring program at home, through enrollment in an institution operated by a state agency or through any other program which is approved for the child by the department.

No child shall be placed in a special education program without prior consultation, evaluation, reevaluation, and consent as set forth and implemented by regulations promulgated by the department.

Within five days after the referral of a child enrolled in a regular education program by a school official, parent or guardian, judicial officer, social worker, family physician, or person having custody of the child for purposes of determining whether such child requires special education, the school committee shall notify the parents or guardians of such child in

writing in the primary language of the home of such referral, the evaluation procedure to be followed, and the child's right to an independent evaluation at clinics or facilities approved by the department under regulations adopted jointly by the department and the departments of mental health and public health and the right to appeal from any evaluation, first to the department, and then to the courts.

Within thirty days after said notification the school committee shall provide an evaluation as hereinafter defined. Said evaluation shall include an assessment of the child's current educational status by a representative of the local school department, an assessment by a classroom teacher who has dealt with the child in the classroom, a complete medical assessment by a physician, an assessment by a psychologist, an assessment by a nurse, social worker, or a guidance or adjustment counselor of the general home situation and pertinent family history factors; and assessments by such specialists as may be required in accordance with the diagnosis including when necessary, but not limited to an assessment by a neurologist, an audiologist, an ophthalmologist, a specialist competent in speech, language and perceptual factors and a psychiatrist.

The department jointly with the departments of mental health and public health shall issue regulations to specify qualifications for persons assessing said child.

These departments through their joint regulations may define circumstances under which the requirement of any or all of these assessments may be waived so long as an evaluation appropriate to the needs of the child is provided.

Those persons assessing said child shall maintain a complete and specific record of diagnostic procedures attempted and their results, the conclusions reached, the suggested courses of special education and medical treatment best suited to the child's needs, and the specific benefits expected from such action. A suggested special education program may include family guidance or counselling services. When the suggested

course of study is other than regular education those persons assessing said child shall present a method of monitoring the benefits of such special education and conditions that would indicate that the child should return to regular classes, and a comparison of expected outcomes in regular class placement.

If a child with special needs requires medical or psychological treatment as part of a special education program provided pursuant to this section, or if his parent or guardian requires social services related to the child's special needs, such treatment or services, or both, shall be made available, in accordance with regulations promulgated jointly by the departments of education, mental health, public health and social services in connection with the child's special education program. Reimbursement of the costs of such treatment or services or both shall be made according to the provisions of section thirteen.

Upon completion of said evaluation the child may obtain an independent evaluation from child evaluation clinics or facilities approved by the department jointly with the departments of mental health and public health or, at private expense, from any specialists.

The written record and clinical history from both the evaluation provided by the school committee and any independent evaluation, shall be made available to the parents, guardians, or persons with custody of the child. Separate instructions, limited to the information required for adequate care of the child, shall be distributed only to those persons directly concerned with the care of the child. Otherwise said records shall be confidential.

The department may hold hearings regarding said evaluation, said hearings to be held in accordance with the provisions of chapter thirty A. The parents, guardians, or persons with custody may refuse the education program suggested by the initial evaluation and request said hearing by the department into the evaluation of the child and the appropriate education

program. At the conclusion of said hearing, with the advice and consultation of appropriate advisory councils established under section one P of chapter fifteen, the department may recommend alternative educational placements to the parents, guardians or persons with custody, and said parents, guardians and persons with custody may either consent to or reject such proposals. If rejected, and the program desired by the parents, guardian or person with custody is a regular education program, the department and the local school committee shall provide the child with the educational program chosen by the parents, guardians or persons with custody except where such placement would seriously endanger the health or safety of the child or substantially disrupt the program for other students. In such circumstances the local school committee may proceed to the superior court with jurisdiction over the residence of the child to make such showing. Said court upon such showing shall be authorized to place the child in an appropriate education program.

If the parents, guardians or persons with custody reject the educational placements recommended by the department and desire a program other than a regular education program, the matter shall be referred to the state advisory commission on special education to be heard at its next meeting. The commission shall make a determination within thirty days of said meeting regarding the placement of the child. If the parents, guardians or persons with custody reject this determination, they may proceed to the superior court with jurisdiction over the residence of the child and said court shall be authorized to order the placement of the child in an appropriate education program.

During the course of the evaluations, assessments, or hearings provided for above, a child shall be placed in a regular education program unless such placement endangers the health or safety of the child or substantially disrupts such education program for other children.

No parent or guardian of any child placed in a special education program shall be required to perform duties not required of a parent or guardian of a child in a regular school program.

Within ten months after placement of any child in a special education program, and at least annually thereafter the child's educational progress shall be evaluated as set forth above. If such evaluation suggests that the initial evaluation was in error or that a different program or medical treatment would now benefit the child more, appropriate reassignment or alteration in treatment shall be recommended to the parents, guardians or persons having custody of the child. If the evaluation of the special education program shows that said program does not benefit the child to the maximum extent feasible, then such child shall be reassigned.

Evaluations and assessments of children and special education programs shall remain confidential and be used solely for the administration of special education in the commonwealth, including, but not limited to, inspection by the department and regional and state advisory councils to insure that every special education program does benefit the children there assigned.

St. 1972, c. 766, § 11, as amended by St. 1978, c. 552, § 20. (9 Mass. Gen. Laws Ann. 188-91 (West Supp. 1981).)

Massachusetts General Laws, Chapter 71B, Section 4:

The school committee of any city, town or school district may, to meet its obligations under section three, with the approval of the department enter into an agreement with any other school committee to jointly provide special education or, subject to the consent of the parent or guardian affected thereby and subject to constitutional limitations, may enter into an agreement with any public or private school, agency, or institution to provide the necessary special education within the city, town or school district.

In the case of an agreement between school committees to jointly provide special education, said agreement shall designate one city, town or school district as the operating agent. Funds received by such operating agent from other cities, towns or school districts or appropriated by such operating agent for the purposes of such agreement, in addition to gifts and grants shall be deposited with and held as a separate account by its treasurer. The school committee may apply said funds to the costs of programs operated pursuant to the agreement without further appropriation.

St. 1972, c. 766, § 11. (9 Mass. Gen. Laws Ann. 193 (West Supp. 1981).)

Massachusetts General Laws, Chapter 71B, Section 5:

Any school committee which provides or arranges for the provision of special education pursuant to the provisions of section three shall pay for such special education personnel, materials and equipment, tuition, room and board, transportation, rent and consultant services as are necessary for the provision of such special education.

A school committee which incurs costs or obligations under the provisions of this section shall include within its annual budget an amount of money to comply with said provisions. Said amount shall be added to the annual budget appropriation for school purposes in each city or town for the support of public schools for the purposes of, and enforceable pursuant to, section thirty-four of chapter seventy-one, notwithstanding any general or special laws or charter provisions which limit the amount of money that may be appropriated in any city or town for school purposes.

St. 1972, c. 766, § 11, as amended by St. 1973, c. 318, § 1. (9 Mass. Gen. Laws Ann. 193 (West Supp. 1981).)

Massachusetts General Laws, Chapter 71B, Section 10:

The department may, on an annual renewal basis, upon the request of the parents or guardians and the recommendations of a local school committee and a regional branch of the division of special education, and with the approval of the secretary of educational affairs refer children requiring special education to any institution within or without the commonwealth which offers curriculum, instruction and facilities which are appropriate to the child's needs and which are approved by the department under regulations prescribed by the departments of education, mental health and public health. The curriculum at such an institution must for approval be equivalent, insofar as the department deems feasible, to the curriculum for children of comparable age and ability in the public schools of the commonwealth.

Before acting on said request the department shall determine the nature and extent of a child's special needs, shall require the local school committee and regional advisory council to prepare and submit plans detailing the time needed to establish facilities adequate for children with special needs in the city, town or school district where the child resides, and shall ascertain whether adequate facilities and instruction programs are available or when adequate facilities can be made available in the city, town or school district where the child with special needs resides. Until adequate facilities can be made available, such child shall be placed in the most adequate program available as determined by the department. The department shall further define by regulation the circumstances in which it shall be directly responsible for the placement of children in such special education programs, and by standards available to the public determine the methods and order of such placements; provided, however, that no child shall be denied access to any program operated by the department of mental health, public health or social services to which in the judgment of the operating department the child should be admitted.

The expenses of the instruction and support actually rendered or furnished to such children with special needs, including their necessary travelling expenses, whether daily or otherwise, but not exceeding ordinary and reasonable compensation therefor, may be paid by the commonwealth; but the department shall issue regulations jointly with the departments of mental health, public health, youth services and social services defining the circumstances in which the commonwealth shall bear all or part of such cost, the circumstances in which school committees shall be required to bear part or all of such cost, and the circumstances in which a parent or guardian may be required to reimburse the commonwealth for part or all of such cost; provided, however, that in no event shall the cost to the school committee for placement under this section be less than the average per pupil cost for pupils of comparable age within the city, town or school district; and, provided further, that in determining the cost to the parent or guardian, if any, no charge shall be made for any educational cost but only for support and care. In determining the cost to the parent or guardian the department shall apply criteria which take into account relative ability to pay.

The department shall direct and supervise the education of all such children, and the commissioner of education shall state in his annual report their number, the cost of their instruction and support, the manner in which the money appropriated therefor has been expended, to what extent reimbursed and such other information as he deems important.

Nothing contained herein shall affect the continued authority of the departments of mental health and public health over all non-educational programs and all treatment for residents or patients in institutions under their control.

St. 1972, c. 766, § 11, as amended by St. 1978, c. 552, § 21. (9 Mass. Gen. Laws Ann. 196-97 (West Supp. 1981).)

REGULATORY PROVISIONS

603 Code of Massachusetts Regulations, Section 28, Paragraph 205.1 (1979):

Nothing in these regulations shall be construed to limit the right of parents to have their children educated at private schools, completely at private expense.

603 Code of Massachusetts Regulations, Section 28, Paragraph 322.2 (1979):

Determination of need for special education; choice of prototype.

The Administrator of Special Education shall determine and state as part of the child's IEP whether the objectives set by the TEAM require for their achievement special education which is not available within the regular education program. The Administrator of Special Education shall state the reasons for the conclusion that the child does or does not require special education. If the child does require special education, the Administrator of Special Education shall complete the child's IEP by stating the prototype through which the child's program is to be provided and the specific program within such prototype. This decision regarding prototype and program shall be based on the type of services which are to be provided to the child, the types of group settings in which those services are to be provided (¶ 322.1(j)), the personnel who are to provide the services (¶ 322.3(a)), and the locations at which the services are to be provided (¶ 322.3(b)). The prototype selected shall be the least restrictive prototype which (by its terms set out in ¶ 502.0) allows the services recommended by the TEAM to be provided in the groups, by the personnel and at the locations chosen pursuant to ¶¶ 322.1(j), 322.3(a) and 322.3(b). Unless the child is to be placed in a Regional Adolescent Program under ¶ 502.7(b)(iv), the Administrator shall not select prototypes 502.7 (home or hospital), which is chosen only by a physician pursuant to ¶ 502.7(a); or 502.9 (diagnostic program) which is selected by

the TEAM pursuant to ¶ 323.4. The Administrator of Special Education shall recommend a specific program and service for a child only after the evaluation of the adequacy of said program or service indicates that the program or service can provide elements in the child's IEP.

603 Code of Massachusetts Regulations, Section 28, Paragraph 504.4(a) (1979):

If the Administrator of Special Education is unable to find an appropriate placement for a child that complies with the elements of the child's IEP, he/she may request assistance from the Division by submitting a letter to the appropriate Regional Branch Office of the Division requesting assistance and listing any schools that have been considered and the reason(s) given by the schools for not accepting the child. The letter shall be accompanied by a copy of the child's IEP, copies of all assessments from the evaluation, and the designation by the Administrator of a placement specialist who will work with the Division.